

Signed and Filed: September 29, 2014



Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case
CARL ALEXANDER WESCOTT and) No. 12-30143DM
MONETTE ROSEMARIE STEPHENS,) Chapter 7
Debtors.)
JANINA M. HOSKINS, Trustee in) Adversary Proceeding
Bankruptcy of the Estate of Carl) No. 12-3148DM
Alexander Wescott and Monette)
Rosemarie Stephens,)
Plaintiff,)
v.)
CARL ALEXANDER WESCOTT and)
MONETTE ROSEMARIE STEPHENS,)
Defendants.)

MEMORANDUM DECISION ON OBJECTION TO DISCHARGE

I. INTRODUCTION

On January 17, 2012, Carl Alexander Wescott ("Wescott") and Monette Rosemarie Stephens ("Stephens") (together "Debtors") filed a voluntary Chapter 7 case. Janina M. Hoskins ("Trustee") is the duly qualified and acting trustee of Debtors.

On October 15, 2012, Trustee filed this adversary proceeding, objecting to the discharge of Wescott and Stephens. Trustee moved

1 for summary judgment and both Debtors opposed. Wescott did not
2 appear at the hearing on the motion on April 26, 2013, and at that
3 hearing the court granted Trustee's motion and on May 22, 2013,
4 entered an Order Granting Summary Judgment (Docket No. 54) and a
5 Judgment Denying Discharge of Debtors (Docket No. 55).

6 Stephens made a timely motion to reconsider on May 16, 2013,
7 and the court granted that motion by order entered on July 18,
8 2013 (Docket No. 68).

9 On October 2-3 and November 4, 2013, the court conducted a
10 trial on the Trustee's objection to Stephens' discharge.
11 Following trial the court requested post-trial submissions on
12 certain issues, after which the matter was submitted for decision.

13 For the reasons set forth below, the court will GRANT
14 Stephens her discharge in this Chapter 7 case.

15 II. DISCUSSION¹

16 **A. The Trustee's complaint alleges seven claims for relief**
17 **as follows:**

18 First claim - Section 727(a)(2)(A)² - Transfer, remove,
19 destroy, mutilate or conceal property of the debtor with intent to
20 hinder, delay or defraud.

21 In this claim the Trustee alleges that Debtors formed a
22 limited partnership known as Pook Snook Dook Trust Limited
23 Partnership ("Pook") and concealed their interest in Pook.

24
25 ¹ The following discussion constitutes the court's findings
26 of fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

27 ² Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 Further, Debtors allegedly transferred funds off-shore or to other
2 entities with actual intent to hinder, delay or defraud creditors.

3 Second claim - Section 727(a)(2)(B) - Post-petition,
4 transfer, remove, etc., property of the estate with intent to
5 hinder, delay or defraud.

6 Here Trustee contends that Debtors made certain post-petition
7 transfers to Atlas Consulting, Inc. ("Atlas"), a corporation owned
8 by Stephens. The complaint alleges that transfers were made from
9 Wescott's personal account to Atlas and then those funds and
10 others were expended by Debtors. Further, on June 1, 2012,
11 Debtors allegedly transferred an interest in their home on Ashbury
12 Street in San Francisco.

13 Third claim - Section 727(a)(3) - Conceal, destroy, mutilate,
14 falsify or fail to keep recorded information from which the
15 debtor's financial information might be ascertained, unless
16 failure justified under all of the circumstances.

17 Debtors allegedly concealed or failed to preserve recorded
18 information from which their financial condition or business
19 transactions might be ascertained for the years 2010 and 2011.

20 Fourth claim - Section 727(a)(4)(A) - Knowingly and
21 fraudulently make a false oath or account.

22 In this claim Debtors are accused of making knowingly false
23 oaths and accounts. More specifically, Stephens is accused of
24 falsely testifying that she had lost a valuable diamond ring while
25 swimming and that she had falsely testified that she and Wescott
26 had changed insurance companies, not realizing that the diamond
27 ring was not insured. Further, Wescott testified that he had no
28 bank accounts outside the United States when in fact he made

1 numerous transfers to bank accounts in Panama and elsewhere in
2 Central or South America. Further, Debtors could not account for
3 \$1 million they received in 2011 and their schedules and statement
4 of financial affairs were false and inaccurate because they failed
5 to list various corporations and limited liability companies that
6 they owned.

7 Fifth claim - Section 727(a)(4)(D) - Knowingly and
8 fraudulently withhold recorded information relating to debtor's
9 property or financial affairs.

10 Because they failed to turn over boxes of documents ordered
11 pursuant to a 2004 examination order, Debtors are accused of
12 intentionally withholding documents relating to their property and
13 financial affairs.

14 Sixth claim - Section 727(a)(5) - Failed to explain any loss
15 of assets.

16 Because Debtors could not account for \$700,000 of \$1 million
17 they received in 2010 and 2011, and \$800,000 paid to them on a
18 second deed of trust, they have failed to satisfactorily explain
19 their loss of assets to meet liabilities.

20 Seventh claim - Section 727(a)(6)(A) - Refused to obey any
21 lawful order of the court.

22 The court issued an order on June 17, 2012, compelling a
23 turnover of documents. Despite having documents in their
24 possession, the complaint alleges that Debtors have refused to
25 turn over documents pursuant to that order, thus refusing to obey
26 a lawful order of the court.

27 **B. Timeliness of the duress defense.**

28 In her answer to the Trustee's complaint, Stephens did not

1 set forth the affirmative defense of duress, a specific
2 affirmative defense that is mentioned in F. R. Civ. P. 8(c)(1),
3 incorporated by Rule 7008(c)(1). It is hornbook law that an
4 affirmative defense not raised is waived. *Wright & Miller,*
5 *Federal Practice and Procedure*, Civil 3d § 1278. *Taylor v. U.S.*,
6 45 U.S. 992, 108 S.Ct. 1300, 99 L. Ed. 2d 510 (1988).

7 Nor did Stephens specifically raise the defense in her
8 opposition to the later motion for summary judgment filed by the
9 Trustee.³ Notwithstanding the waiver of the defense of duress as
10 a pleading matter, F. R. Civ. P. 15(b), incorporated by Rule
11 7015(b), permits pleadings to be amended to conform with evidence
12 produced at trial. This is so even if a party (here Trustee)
13 objects. The court is directed by the rule to permit freely an
14 amendment "when doing so will aid in presenting the merits and the
15 objecting party fails to satisfy the court that the evidence would
16 prejudice that party's action...." The court may grant a
17 continuance to enable the objecting party to meet the evidence.

18 During the trial Stephens offered extensive evidence of a
19 marriage filled with abuse by Wescott and significant difficulties
20 she had in carrying on her life. Those difficulties are
21 summarized below. Trustee did not demonstrate any prejudice nor
22 did she seek a continuance to enable her to meet the evidence. In
23 fact, there was an interval of nearly one month between the
24 beginning of the trial and the final day of trial, and clearly the
25 Trustee had an opportunity to address the duress defense during

26
27 ³ Stephens' citation to California authorities to the
28 contrary are not dispositive as this matter is governed by federal
procedure.

1 that interval.

2 In *Kontrick v. Ryan*, 540 U.S. 443, 458-59 (2004), the Supreme
3 Court noted that affirmative defenses such as duress should be
4 raised in an answer or responsive pleading. However, an "answer
5 may be amended to include an inadvertently omitted affirmative
6 defense, and even after the time to amend "of course" has passed,
7 "leave [to amend] shall be freely given when justice so requires."
8 *Id.*, citing FRCP 15(a), made applicable by Rule 7015.

9 The Ninth Circuit itself has long been liberal about the
10 amendment of answers to raise affirmative defenses, as long as the
11 delay does not prejudice the plaintiff. *Rivera v. Anaya*, 726 F.2d
12 564, 566 (9th Cir.1984). Leave to amend "shall be freely given
13 when justice so requires." This policy is "to be applied with
14 extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316
15 F.3d 1048, 1051 (9th Cir. 2003). There is a presumption under Rule
16 15(a) in favor of granting leave to amend. *C.F. ex rel. Farnan v.*
17 *Capistrano Unified School Dist.*, 654 F.3d 975, 985 (9th Cir.2011).
18 A court may exercise its discretion to deny leave to amend when
19 there is "undue delay, bad faith or dilatory motive on the part of
20 the movant, ... undue prejudice to the opposing party by virtue of
21 allowance of the amendment, [and] futility of amendment." *Froman*
22 *v. Davis*, 371 U.S. 178, 182 (1962).

23 The liberal policy permitting amendment is not inconsistent
24 with another prevailing principle that is itself hornbook law.
25 That is that discharge objections should be construed narrowly
26 and, of course, the burden of proof is on the plaintiff objecting
27 to discharge. Rule 4005.

28 Here, Stephens and her counsel have not unduly delayed the

1 assertion of a duress defense, nor has any delay resulted in any
2 prejudice to the Trustee, as she has long been aware of Stephens'
3 assertion of abuse/intimidation/duress. When the Trustee filed
4 her motion for summary judgment, Stephens raised the issue of
5 abuse by and fear of Westcott. In fact, in her reply to Stephens'
6 opposition, the Trustee's counsel stated:

7 Needless to say, the Trustee is highly skeptical of Ms.
8 Stephens claims that she is psychologically intimidated by
9 Mr. Wescott. If the matter is tried, the Trustee will present
10 substantial evidence establishing that this claim is a
11 cynical ploy by highly manipulative, jointly acting Debtors.
12 Nonetheless, for the purposes of this Motion, the Trustee is
assuming, as she must, that every admissible fact alleged in
Ms. Stephens' "Stephens Declaration in Support of Opposition
to Motion for Summary Judgment" is true. Taking that
declaration at its face value, the Trustee is still entitled
to summary judgment.

13 Trustee's Reply filed on 4/19/2013 at Dkt. 48, page 6.⁴ In fact,
14 in footnote 2, Trustee's counsel identifies the evidence she will
15 introduce to negate Ms. Stephens' assertion of intimidation:

16 Among other things, there is a 341 transcript of Ms. Stephens
17 upbraiding Mr. Wescott, not vice versa; a third party witness
has testified in deposition that Ms. Stephens was actively
involved in certain of the South American ventures; and Ms.
18 Stephens executed numerous deeds concerning the Sonoma,
Mendocino, and Lake County properties jointly owned by the
19 two Debtors, see accompanying Reply Declaration of John H.
MacConaghy, Group Ex. 1.

20 The trustee further states in another footnote:

21 The Trustee does not accept as true the extraordinary
22 Declaration of Sheila Gropper Nelson, which consists almost
entirely of pop psychology, unqualified lay opinion, improper
23 "vouching" for a client, and a selective disclosure of
privileged information, see the Trustee's Evidentiary
24 Objection, Dkt. No. 47.

25 Trustee argues that Rule 7015(b) is being used by Stephens to

26 ⁴ Despite Trustee's suggestion that she would present
27 substantial evidence establishing Stephens' cynical ploy, the
Trustee offered no evidence of her own (other than cross-
28 examination of Stephens and her witness) to disprove the duress.

1 bootstrap a legal theory and that liberal amendments are permitted
2 only in connection with factual issues. But the court believes
3 that the facts that Stephens has demonstrated are sufficient, if
4 persuasive, to rebut critical elements of Trustee's seven claims
5 for relief for denial of discharge.

6 First, for a discharge to be denied under § 727(a)(2), a
7 debtor must have "intent to hinder, delay, or defraud a creditor
8 or an officer of the estate" when the property is transferred,
9 removed, destroyed, mutilated, concealed or permitted to be
10 transferred, removed, destroyed, mutilated or concealed. It is a
11 factual matter whether a debtor had the requisite intent.

12 Similarly, § 727(a)(3) excuses the concealment, destruction,
13 mutilation or falsification of recorded information or the failure
14 to keep it, if such act or failure to act "was justified under all
15 circumstances of the case." Thus, justification under the
16 circumstances of the case is a question of fact.

17 Section 727(a)(4) requires a false oath or account to be made
18 "knowingly and fraudulently." Once again, whether something is
19 knowingly or fraudulently done is not a legal theory, but a
20 factual determination.

21 Next, the same "knowingly and fraudulently" element must be
22 present before a discharge can be denied under § 727(a)(4)(D)
23 based upon withholding from an officer of the estate recorded
24 information, including books, documents, records, and papers, etc.

25 Continuing, § 727(a)(5) permits denial of a discharge when a
26 loss of assets or a deficiency of assets cannot be explained
27 "satisfactorily." Again, "satisfactorily" does not involve a
28 legal theory but rather a factual determination.

1 Finally, a discharge may be denied for a debtor's refusal to
2 obey a lawful order of the court, with an exception not applicable
3 to this case. Refusal is a factual matter that may or may not
4 result in a denial of discharge.

5 In view of the foregoing, the trustee has not been unduly
6 prejudiced by an untimely assertion of the affirmative defense of
7 duress.

8 **C. The facts proven at trial by the Trustee:**

9 Nine months before filing for bankruptcy, Stephens signed a
10 document making Ivy League Charters, a Nevada LLC which is owned
11 by Gunvor SA, which is a Latin American corporation owned by
12 Wescott, the new general partner of Pook. (Exhibit 27)

13 Six months before filing bankruptcy, Stephens wrote a check
14 from her personal account and deposited \$6,500 into the Atlas
15 checking account, depleting her personal account. (Trial
16 Transcript, October 3, 2013; 73:6-10; Exhibit 32, p. 46); (Trial
17 Transcript, October 3, 2013; 76:9 -78:17; Exhibit 36, p. 22.) At
18 her deposition, Stephens admitted she and her husband were
19 transferring monies to her business account because their personal
20 bank accounts had been attached. Stephens confirmed that monies
21 were transferred from her personal account into the Atlas account
22 six weeks before filing for bankruptcy.

23 Shortly after Wescott was sued by creditors, (Exhibit 6) he
24 hired Lodmell & Lodmell, a law firm that advertises itself as the
25 number one asset protection firm in the United States. (Exhibit 8)
26 Debtors executed a transmutation agreement in February of 2010
27 (Exhibit 9). Stephens accepted all of the real estate in
28 California and some personal property. According to the

1 transmutation agreement, the valuation of Stephens' property
2 totaled \$27 million in 2010 which had no value at the time of
3 their bankruptcy filing. (Exhibit 9) Stephens and her husband
4 transferred their assets into the Wescott-Stephens Family Trust, a
5 self-settled trust which was prepared by Lodmell & Lodmell.
6 (Exhibit 67)

7 On May 1, 2010, Wescott transferred a \$1 million promissory
8 note to Stephens as her sole and separate property. Stephens
9 accepted the assignment. (Exhibit 13) Wescott also transferred two
10 membership interests in the Reliant Group with a value of \$450,00
11 to Stephens on May 10, 2010. (Exhibit 14)

12 On May 11, 2010, a creditor obtained a writ of attachment
13 against Debtors. (Exhibit 15)

14 On June 25, 2010, Lodmell & Lodmell registered Pook in
15 Arizona and Stephens was named the general partner. (Exhibit 16)
16 On September 24, 2010, she transferred the promissory note and the
17 LLC interests, which were her separate property, worth almost a
18 million and a half dollars, into the Wescott-Stephens Family
19 Trust. (Exhibit 17)

20 According to Jay Crom's ("Crom") Supplemental Report, dated
21 August 30, 2013, (Exhibit 78), an additional bank account in the
22 name of Atlas showed a post-petition \$17,500 deposit on March 5,
23 2012 and a \$2,500 deposit on March 27, 2102. The source of these
24 funds was not disclosed or the funds turned over to the Trustee.
25 Stephens was paid \$38,000 in 2011. Crom concluded that there are
26 numerous unexplained transactions and post-petition cash deposits
27 to the Atlas accounts. (Exhibit 78, p .6) No explanation of these
28 transactions or post-petition cash deposits was offered at trial

1 but Crom's testimony is inconclusive as to Stephens' culpability.

2 Crom's Supplemental Expert Report concluded that Stephens was
3 financially sophisticated, involved in family financial affairs
4 and was aware of her family's financial distress as of March 2009
5 despite her testimony that her husband was in control of all of
6 their finances. (Crom's Supplemental Expert Report, August 30,
7 2013; p. 3, 4 and 7)

8 Stephens had boxes of documents pursuant to a Rule 2004
9 Examination and court order at her home and she did not tell the
10 Trustee she was in possession of the documents. (Trial
11 Transcript, October 3, 2013; 135:9 -21.)

12 After reviewing thousands of documents discovered by the
13 Trustee, Crom concluded ... the documents suggest that the Debtors
14 have made attempts to transfer assets out of the reach of
15 creditors and to conceal assets and transfers from the Trustee by
16 withholding documents and information. (Crom's Supplemental
17 Report, August 30, 2013)

18 Stephens failed to list a 5.1% equity interest in Rainforest
19 Capital LLC on her Schedules despite the fact that she had filed
20 three amended sets of Schedules in this case. She should have
21 known of the interest because she received a K-1 in 2011 which was
22 addressed to her. (Exhibit 3, p. 1) According to Crom's Expert
23 Report, Stephens' capital account in the LLC had a balance of
24 \$187,711 as of 12/31/2011. (Crom Expert Report, April 3, 2013, p.
25 5)

26 Stephens claimed that the K-1 was a mistake and that it
27 should have been addressed to Pook. (Trial Transcript, October 2,
28 2013; 154:6-10) But the Trustee had filed the Adversary Case

1 against Pook on May 21, 2012. (Docket No. 90) The Default
2 Judgment was entered on August 27, 2012. (Docket No. 20) Pursuant
3 to this Court's order for the Debtors to file amended schedules,
4 (Docket No. 137) the Debtors filed amended Schedules on July 5,
5 2012. Stephens knew that any property transferred to Pook was 1)
6 a fraudulent transfer and 2) was her separate property.

7 Stephens did not list the Wescott-Stephens Family Trust on
8 her Statement of Financial Affairs until she amended her Statement
9 of Financial Affairs for the third time, (Exhibit 2, p. 65) two
10 months after the Trustee had filed the adversary proceeding to set
11 aside the fraudulent transfers made to the trust.

12 Stephens' last amended Statement of Financial Affairs states
13 that there was rental income for 2010 of approximately \$275,000.
14 (Exhibit 2, p. 53) Crom testified that there was little or no
15 rental income paid to the Debtors in 2010 (Trial Transcript,
16 October 2, 2013; 13:2-5). Stephens offered no explanation or
17 evidence to explain why she listed rental income when there was
18 none except to claim she relied on her husband and attorney to
19 prepare bankruptcy papers. This was a material fact since there
20 was approximately \$245,000 deposited into the Atlas bank account,
21 but the funds were from the sale of concealed assets, not rental
22 income.

23 Stephens filed declarations with this Court claiming she was
24 never involved with the purchase, sale or financing of any
25 properties in California or Latin America. (Exhibit 68; 2:7-19;
26 Exhibit 70; 5:11) Stephens was listed as the seller of property
27 in California in which her husband was the broker (Trial
28 Transcript, October 3, 2013; 97:12-19); she admitted she was on

1 loans that were for the financing of property (Trial Transcript,
2 October 3, 2013; 99:4- 9); she admitted she was a manager of 9501
3 Lane Drive LLC and was a new borrower; (Trial Transcript, October
4 3, 2013; 99:19-101:7); she signed a guarantee in favor of Luther
5 Burbank Savings six months before declaring bankruptcy; (Trial
6 Transcript, October 3, 2013; 102:21-103:17); she personally made
7 payments on the loan to Luther Burbank Savings (Trial Transcript,
8 October 3, 2013; 106:12-19); she and Wescott had purchased
9 property in South America (Trial Transcript, October 3, 2013;
10 116:14-25); she was a seller of property in Ecuador (Trial
11 Transcript, October 3, 2013; 117:9-20; 118:10-119:7); and she
12 received and wired funds to Latin America. (Trial Transcript,
13 October 3, 2013; 119:10-121:17) (Exhibits 38, 39, 40, 41, 47, 49
14 and 50)

15 On August 26, 2012, this Court issued an Order for the
16 Trustee to inspect documents at Stephens' home in San Francisco
17 since the Debtors had failed to produce documents. (Docket No.
18 200) On September 5, 2012, the Trustee's counsel and accountant
19 inspected documents at Stephens' home. No boxes of documents were
20 produced for inspection.

21 Stephens testified that there were 20 boxes of documents in
22 her garage. The boxes of documents had been brought to her home
23 in the summer of 2011. Stephens further testified that this was
24 about the same time her husband obtained a storage unit. (Trial
25 Transcript, October 3, 2013; 135:4-21) She chose to deliver them
26 to her attorney rather than inspect them and turn over pertinent
27 documents to the Trustee.

28 At trial, Stephens admitted that she knew there were boxes of

1 documents in a storage unit that was not disclosed and the
2 documents in the storage unit had come from the office that had
3 been foreclosed upon in the summer of 2011. (Trial Transcript,
4 October 3, 2013:135:9-16)

5 Stephens also admitted she made payments to City Storage in
6 San Francisco for the storage unit. (Trial Transcript, October 3,
7 2013; 126:11-23).

8 The Trustee discovered 75 boxes of documents and 6 hard
9 drives in the storage unit. Despite 2004 Examinations and an
10 Order from this court compelling the Debtors to produce records,
11 the Debtors did not do so. Many of the documents found in the
12 storage unit were used in trial related to the sale of assets.

13 On February 24, 2011, \$125,552.87 was wired into the Pook
14 account (Exhibit 34) and then on February 24, 2011, \$127,202.87
15 was transferred into another account. Stephens testified that she
16 did not know what happened to the funds. (Trial Transcript,
17 October 3, 2013; 88:16-23) However, at one of the 341 hearings
18 taken on May 9, 2012, Debtors were questioned by a creditor
19 regarding the use of the funds from the Pook Wells Fargo account.
20 Wescott testified that "...we made loans from there." Stephens
21 and Wescott were asked: "Have you borrowed money in the last six
22 months from the LP?" Wescott: "I believe we have." "Who made
23 those loans?" Stephens: "I think we discussed it together."
24 (Trial Transcript, October 3, 2013; 90:3-91:8)

25 During 2011 through January 2012, \$245,615 was deposited into
26 the Atlas account (Exhibit 36). But Stephens had no explanation
27 as to the source of the remaining \$207,000 that was deposited into
28 the Atlas account beyond the \$38,000 she earned that year. (Trial

1 Transcript, October 3, 2013; 94:14-21).

2 **D. Stephens' principal defense is based upon duress.**

3 Stephens offered little, if any, evidence to rebut the
4 numerous facts established by the Trustee, as summarized above.
5 Instead, she defended on the ground that she lacked the requisite
6 knowledge and intent in performing the acts attributed to her to
7 justify denial of discharge.

8 Over a decade before this case began Stephens and Westcott
9 were married. Almost from the beginning he subjected her to
10 verbal and psychological abuse which slowly and incrementally
11 escalated to include physical aspects through shoving, throwing
12 and pushing.

13 Stephens focused entirely on starting a family as a result of
14 being older and all of the difficulties involved with that,
15 including three miscarriages.

16 Westcott took advantage of the fact that Stephens was 40 when she
17 met him, and desperately wanted to have a family. (Trial Transcript
18 11/4/13 pg 21: 5-9) When Stephens was pregnant with her first child,
19 Westcott would get angry with her, stomp up and down, show aggressive
20 behavior and yell at her. (Trial Transcript 11/4/13 pg 18:7-9)
21 Westcott told her she was overweight, unattractive and old. (Trial
22 Transcript 11/4/13 pg 21:13-15) and that he would leave her and have
23 children with another woman if she did not have more children
24 after her first child. He told her he would make her life a
25 living hell if she left him. He did just that. He said he would
26 use all the money he had to fight her in a divorce. (Trial
27 Transcript 11/4/13 pg 19:1-6)

28 Westcott told her that if she left him, he would take the

1 child from her or he would try to get as much custody as possible,
2 and he would make sure that she would get as little oversight over
3 her children as possible. Stephens testified she was afraid for
4 losing her child at that time. (Trial Transcript 11/4/13 pg.18:10-
5 14)

6 Over time Wescott engaged in substantially greater and more
7 pervasive acts of abuse while orchestrating complete control over
8 all of Stephens finances, including her separate property from her
9 first marriage, her interest in Atlas and her prior earnings.
10 Over the years he directed that Stephens have less and less
11 control and knowledge of the Debtors' finances.

12 Stephens had to pay all of her personal and business bills
13 through his office using either Atlas or other means that he
14 controlled and directed. For example, Wescott directed Stephens
15 to make deposits including the deposit of \$6500 into the Atlas
16 checking account.

17 Westcott demanded that Stephens add his name to the Atlas
18 account and be named as CEO and he controlled all of the finances,
19 hers, theirs and his. She never had any access to the Pook
20 accounts (Trial Transcript 11/4/13 pg 49:14-20)

21 He directed that she sign an document drafted at his
22 directions by Lodmell and Lodmell either immediately before or
23 immediately after she had given birth to their third child while
24 being a de facto single parent of two toddlers, one of whom has a
25 diagnosed disability.

26 Wescott insisted Stephens sign as the recipient of the
27 Rainforest Capital note for a million dollars in May 1, 2010,
28 negotiated entirely by Wescott and to which she was not privy.

1 Wescott directed her to transfer the note to the Wescott Stephens
2 Family Trust on September 24, 2010.

3 Wescott also had an interest in the Reliant Group transferred
4 to Stephens entirely at his direction during substantially the
5 same period of time and subject to the same document authored by
6 Lodmell and Lodmell.

7 Stephens was required to sign a document making Ivy League
8 Charters the new general partner of Pook and was directed by
9 Wescott to sign a bankruptcy petition prepared by an attorney he
10 chose and based entirely on the information provided to that
11 attorney by Wescott.

12 Westcott would often get aggressive and yell in the face of
13 the more diminutive Stephens. (Trial Transcript 11/4/13 pg 19: 6-
14 7) Sometimes Westcott would push Stephens. He would say to her,
15 "I'm going to fight you to the death. I'm going to make your life
16 a living hell." (Trial 11/4/13 pg 19:3-14) On one occasion
17 Westcott jumped on her, pushed her to the ground. (Trial
18 Transcript 11/4/14 pg 19:15-22) and more than once he took
19 drinking glasses in their kitchen and started smashing them in the
20 sink and glass shattered and went everywhere in front of her.
21 (Trial transcript 11/4/13 pg 20: 19-25, pg 19:1)

22 He also threw glasses out of the third floor window onto the
23 street below at the couple's house in San Francisco. (Trial
24 Transcript 11/14/13, pg. 51:19-20) He once threw a suitcase
25 against a cabinet, smashing the cabinet door. There would rarely
26 be a month when he would not smash telephones to pieces. (Trial
27 Transcript 1/4/13 pg 77:16-24)

28 Wescott's violent conduct included totaling two cars before

1 the bankruptcy as identified at the 341 meetings and displayed no
2 remorse. (Plaintiff's Exhibit 54, 341 Meeting, March 21, 2012,
3 Bates Stamped pages 00144-00145 and Stephens' Declaration
4 Plaintiff Exhibit 68, Paragraph 8 Bates Number 005))

5 Wescott had weights that looked like baseball bats and used
6 them to smash the doors on his file cabinets one night when he was
7 angry. (Trial Transcript 11/4/13 Pg 77:24-25, pg 78:1) More than
8 once he broke computer monitors and even smashed the family large
9 screen T.V. (Trial Transcript 11/4/13 Pg. 78: 3-6)

10 Wescott, a man who stood at 6 feet and weighed 240 pounds
11 (Trial Transcript 11/4/13 pg 44:1-7) was used to being in control
12 and getting his own way and consistently acted to emotionally and
13 physically dominate and control Stephens' life.

14 As a direct and proximate result of all of Wescott's
15 overbearing conduct Stephens learned to adapt, to keep her head
16 down, not to make waves, and not to question him. This started
17 early and continued over a period of years. She developed coping
18 skills not to make Westcott angry or to elicit his anger to avoid
19 the physical and emotional abuse. (Trial Transcript 11/4/13 51:16-
20 17)

21 She tried to be quiet and not ask him questions about things
22 that she thought would be likely to upset him to avoid the
23 physical and emotional abuse. (Trial Transcript 11/4/13 Pg 51:19-
24 21; Plaintiff's Exhibit 75.

25 Westcott controlled all the couple's finances and all their
26 investments. Stephens testified she was "maxed out" for most of
27 the marriage as a result of Westcott's verbal and emotional abuse.

28 **E. Application of the duress defense to the undisputed facts**

1 in the context of section 727.

2 Related to the duress defense, Stephens bases a portion of
3 her defense on the theory that the inter-spousal transmutation of
4 property did not provide anything of value to her, and thus a
5 presumption of undue influence applies under California law.
6 While that may be so, it is of little import in this denial of
7 discharge action. The Trustee is not to trying to reverse the
8 consequences of any inter-spousal transfer, she is trying to deny
9 Stephens her discharge in bankruptcy. Stephens' reliance on
10 *Station v. Wilson (In re Wolf)*, 2007 Bankr. LEXIS 2736, does not
11 help her. In that case the chapter 7 trustee attempted to obtain
12 property claimed by a debtor's former wife. He contended that the
13 property that was the subject of the transmutation was still
14 property of the estate. The wife was successful in her defense by
15 convincing the court that the grant deed by which he obtained the
16 debtor's property was the product of undue influence. The court
17 agreed, citing numerous cases for the proposition that the
18 presumption of undue influence obtains when the marital
19 transaction is one in which one spouse deeds his or her interest
20 in community property to the other for no or inadequate
21 consideration. Because the trustee could not demonstrate
22 consideration given for the property, her former spouse received
23 an unfair advantage that the trustee could not capitalize on for
24 the benefit of the estate.

25 Returning to this case, the principal defense is whether or
26 not here the difficult and oppressive circumstances under which
27 Stephens was forced to live her life and raise her children
28 completely exonerate her from the myriad instances of transfers,

1 representations, and other activities as described and largely
2 unrequited by the Trustee at trial.

3 Debtors, at the instance and control of Wescott, were
4 involved in numerous complex real estate and other business
5 activities both in the United States and in several other
6 countries. Those businesses and activities involve numerous items
7 of real and personal property. While maintaining that empire
8 under his control, Wescott also dominated and controlled his wife,
9 Stephens, subjecting her to extensive verbal and mental abuse, and
10 in fact if not actual physical abuse, the constant threat of it.
11 This activity by Wescott obviously had a substantial negative
12 impact on Stephens, both personal, financially, emotionally, and
13 physical. Over the course of her strife-ridden marriage she had
14 three miscarriages, three live births of boys, one of whom is
15 physically disabled. Based upon the undisputed testimony, she was
16 by and large a single parent of those three boys. For several
17 years while she coped with those physical problems she also
18 attended to the illness of her own parents.

19 Trustee contends that, even if the court were to consider the
20 duress defense, that Stephens has failed to carry her burden by
21 offering expert testimony. The court is convinced, however, that
22 the best test of the trier of fact on a discharge objection is one
23 of common sense, something an expert is not required to
24 demonstrate. This is not a case about determining whether
25 Stephens in fact suffered from some diagnosable mental, physical
26 or emotional illness; rather it is to determine whether her
27 conduct, the conduct of a well-educated and highly experienced
28 business woman in her own right, comes within the very strict

standards of § 727, which, as discussed below, require the highest level of intent to hinder and delay or defraud, or to deceive.

Trustee contends that duress is subject to a two-prong test, and that Stephens has failed to demonstrate that she had no choice in executing the various documents or making the various disclosures that make up Trustee's case. In other words, citing *Wiksell v. Commissioner*, 90 F.3d 1459 (9th Cir. 1966) and *U.S. v. Miles*, 2012 U.S. Dist. LEXIS 45552 (N.D. Cal. 2012), Stephens should have proven that she had no choice but to do the things her husband said to do and secondly that she would not have done so absent Wescott's pressure. In those cases, however, the issue was whether the defendants could avail themselves of an innocent spouse defense for tax liability. In *Miles*, for example, the court found that notwithstanding the threats of her husband, Ms. Miles' perception was not clouded nor her free will constrained.

Here there is a different test, namely whether Stephens actually intended to harm her creditors or knowingly and fraudulently deceived the bankruptcy court or the Trustee. Thus, the issue is not whether Stephens was liable to any of the creditors of this estate, but whether she should be branded for life by denial of a discharge based upon actual fraud, actual fraudulent intent, unjustified failure to account, or intentional misconduct. The evidence does not support the Trustee's case and the court cannot make the requisite findings necessary to deny Stephens her discharge.

Turning to the causes of action, the first claim for relief requires Trustee to prove that transfer of assets to and concealment of interests in Pook was done with actual intent to

1 hinder, delay or defraud creditors. The evidence simply does not
2 support that conclusion given Stephens' virtual puppet-like
3 obedient conduct at the command of her husband. To the extent
4 that Wescott himself actually intended to hinder, delay or defraud
5 his creditors is obvious; the evidence simply does not support a
6 finding that Stephens is equally culpable.

7 On the second claim for relief, the same actual intent is
8 required as to property of the estate as distinguished from
9 property of the debtor. Transfer of assets to Atlas and actions
10 concerning Debtors' San Francisco residence again are undisputed;
11 what is not established by the evidence is Stephens own actual
12 intent.

13 The third claim for relief has to do with the adequacy of
14 recorded information. Here there is no actual intent element, but
15 the statute plainly permits an excuse when justified under all of
16 the circumstances. The circumstance applicable here is that
17 Wescott was the principal one in charge of maintaining the books
18 and records of the couples' activities. More importantly,
19 whatever requirement might be imposed upon Stephens herself,
20 particularly regarding Atlas or Stephens own accounts, the failure
21 to maintain adequate records is certainly justified under the
22 circumstances of her being the victim of egregious spousal abuse.

23 The fourth claim for relief pertains to a false oath, one
24 that must be made knowingly and fraudulently. One component of
25 this claim is much ado about nothing that came from Trustee's
26 contention that Stephens could not properly account for her
27 valuable diamond ring that she says she lost while swimming.
28 Innuendo will not suffice and the court simply cannot find that

1 Stephens knowingly made a false oath about the circumstances
2 pertaining to that ring.

3 As to transfers to banks outside of the United States, and
4 the failure to list various entities or monies received, the
5 evidence does not support a finding that Stephens acted knowingly
6 and fraudulently in completion of her own bankruptcy schedules.

7 The fifth claim for relief pertains to the withholding of
8 recorded information. Again, there is a knowing and fraudulent
9 element that the evidence does not support vis-a-vis Stephens.
10 The failure to turn over boxes of documents pursuant to 2004
11 examination is a bit more problematic for the court. On careful
12 reflection, however, the court is satisfied that Stephens and her
13 counsel were in a near-impossible situation when Wescott demanded
14 return of his records while they should have been delivered to the
15 Trustee. With the benefit of hindsight, it is easy to state that
16 the recorded information previously maintained by the Debtors was
17 no longer theirs, and belonged to the Trustee. That being said,
18 the dynamics of the situation, while regrettable, do not support a
19 finding of knowingly fraudulent conduct.

20 The sixth claim for relief imposes a dire consequence on a
21 debtor who fails to explain a loss of assets. While Stephens did
22 not fully explain the loss of assets, she did adequately explain
23 why she was unable to explain such a loss, namely the spousal
24 abuse that is replete on this present record.

25 Finally, the seventh claim for relief applies when a debtor
26 refuses to obey a lawful order of the court. Much time was spent
27 on this issue at trial, in the prior motion for summary judgment,
28 and the court's subsequent reconsideration of that summary

1 judgment. Trustee only discovered by accident records at a
2 storage facility. That notwithstanding, consistent with
3 disposition of the fifth claim, the court is not prepared to find
4 that Stephens refused to obey the order, rather, she simply did
5 not appreciate the extent of her obligations, and the
6 circumstances surrounding her delivery of that information to her
7 counsel and her counsel's return of that information to Wescott
8 does not constitute a basis to deny Stephens her discharge.

9 In conclusion, this is has been a very stressful case for the
10 Trustee and her counsel and Stephens and her counsel. The Trustee
11 is commended for carrying out her statutory duty of pursuing a
12 discharge even though a successful prosecution provides no
13 economic benefit to the estate. Trustees are encouraged to police
14 and enforce the rules implicit and explicit in the administration
15 of bankruptcy. Further, the fact that there is no economic
16 benefit to the estate is not the point. The law is well settled
17 that honest debtors are entitled to a fresh start; dishonest ones
18 are not and the bankruptcy system needs diligent trustees in order
19 to work properly. That the Trustee did not prevail against
20 Stephens does not diminish the importance and significance of her
21 efforts. The court is convinced that, notwithstanding the
22 Trustee's and her counsel's vigor and enthusiasm, in its
23 discretion it should not and cannot impose upon Stephens the dire
24 consequences of denial of a discharge.

25 III. DISPOSITION

26 The court is concurrently issuing a judgment concluding this
27 adversary proceeding and granting Stephens her discharge for the
28 reasons stated in this memorandum decision.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

END OF MEMORANDUM DECISION